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Cases, Regulations and Statutes

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The statute⁹ goes on to state “. . . the term “specified plant” means –

- (i) Any tree or vine which bears fruits or nuts, and
- (ii) Any other plant which will have more than one yield of fruits or nuts and which generally has a preproductive period of more than 2 years from the time of planting or grafting to the time at which plant begins bearing fruits or nuts.

Such term shall not include any property which is planted or grafted outside of the United States.

So it appears that the key is “adjusted basis” in figuring the deduction

It appears that the question of how to handle capitalized expenditures depends upon the accounting rules the taxpayer is following, in terms of what is “adjusted basis.” That is the key issue here. If that is the case, the taxpayer should be prepared to defend their accounting on that issue. The statutory language provides little advice. Final regulations, if issued, should deal with that issue. Until regulations or a ruling or rulings are issued, the best advice is to review the accounting practices being followed in terms of all costs that are to be capitalized up to the time the

“adjusted basis” must be determined.

ENDNOTES

¹ Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 101(a), 116 Stat. 40 (2002).

² Pub. L. No. 110-185, § 103, 122 Stat. 613 (2008).

³ Pub. L. No. 111-312, 124 Stat. 3296 (2010).

⁴ The Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010 (2014).

⁵ Protecting Americans from Tax Hikes Act of 2016 (PATH), Pub. L. No. 114-113, § 143, 129 Stat. 2242 (2015).

⁶ I.R.C. § 168(k)(5).

⁷ I.R.C. § 168(k)(5).

⁸ I.R.C. § 168(k)(5).

⁹ I.R.C. § 168(k)(5)(B).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

FEDERAL FARM PROGRAMS

ORGANIC FOOD. The AMS has issued proposed regulations which address recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board following their October 2015 meeting. These recommendations pertain to the 2017 Sunset Review of substances on the USDA National List of Allowed and Prohibited Substances. Consistent with the recommendations from the NOSB, this proposed rule would remove eleven substances from the National List for use in organic production and handling: lignin sulfonate, furosemide, magnesium carbonate, Chia, dillweed oil, frozen galangal, inulin, frozen lemongrass, chipotle chile peppers, turkish bay leaves, and whey protein concentrate. **82 Fed. Reg. 5431 (Jan. 18, 2017).**

The AMS has adopted as final regulations which amend the organic livestock and poultry production regulations by adding new provisions for livestock handling and transport for slaughter and avian living conditions, and expanding and clarifying existing requirements covering livestock health care practices and mammalian living conditions. Specifically, the regulations: (1) clarify how producers and handlers must treat livestock and poultry to ensure their health and wellbeing; (2) clarify when and how certain physical alterations may be performed on

organic livestock and poultry in order to minimize stress; (3) set maximum indoor and outdoor stocking density for avian species, which would vary depending on the type of production and stage of life; (4) define outdoor access to exclude the use of structures with solid roofing for outdoor access and require livestock and poultry to have contact with soil; (5) add new requirements for transporting livestock and poultry to sale or slaughter; and (6) clarify the application of FSIS requirements regarding the handling of livestock and poultry in connection with slaughter to certified organic livestock and poultry establishments and provide for the enforcement of USDA organic regulations based on FSIS inspection findings. **82 Fed. Reg. 7042 (Jan. 19, 2017).**

PLANT PESTS. The APHIS has re-issued proposed regulations which revise the regulations regarding the movement of plant pests by adding risk-based criteria for determining the plant pest status of organisms, establishing a notification process that could be used as an alternative to the current permitting system, and providing for the environmental release of organisms for the biological control of weeds. The proposed changes clarify the factors that would be considered when assessing the plant pest risks associated with certain organisms and facilitate the importation and interstate movement of regulated organisms. The new proposed regulations replace proposed regulations issued in 2001, 66 Fed. Reg. 51340 (Oct. 9, 2001). **82 Fed. Reg. 6980 (Jan. 19, 2017).**

FEDERAL ESTATE AND GIFT TAXATION

ALLOCATION OF BASIS FOR DEATHS IN 2010. The IRS has adopted as final regulations that provide guidance regarding the application of the modified carryover basis rules of I.R.C. § 1022. The regulations modify provisions of the Treasury Regulations involving basis rules by including a reference to I.R.C. § 1022 where appropriate. The addition of the references to I.R.C. § 1022 are required because, although I.R.C. § 1022 was applicable only to decedents dying in calendar year 2010, basis determined pursuant to that section will continue to be relevant until all of the property whose basis is determined under that section has been sold or otherwise disposed of. The regulations add reference to I.R.C. § 1022 to a large number of basis regulations, including:

(1) Treas. Reg. § 1.48-12(b)(2)(vii)(B) provides that, if a transferee's basis is determined under section 1022, any qualified rehabilitation expenditures incurred by the decedent under section 48 within the measuring period that are treated as having been incurred by the transferee decrease the transferee's basis for purposes of the substantial rehabilitation test.

(2) Treas. Reg. §§ 1.179-4(c)(1)(iv), 1.267(d)-1(a)(3), 1.336-1(b)(5)(i)(A) and 1.355-6(d)(1)(i)(A)(2) provide that property acquired from a decedent in a transaction in which the recipient's basis is determined under section 1022 is not acquired by purchase or exchange for purposes of sections 179, 267, 336, and 355(d).

(3) Treas. Reg. § 1.197-2(h)(5)(i) provides that the anti-churning rules of Treas. Reg. § 1.197-2(h) do not apply to the acquisition of a section 197(f)(9) intangible if the acquiring taxpayer's basis in the intangible is determined under section 1022.

(4) Treas. Reg. § 1.306-3(e) provides that section 306 stock continues to be classified as section 306 stock if the basis of such stock is determined by reference to the decedent-stockholder's basis under section 1022. In addition, the revision of the last sentence of the existing regulation clarifies the reference to "the optional valuation date under section 1014" by changing the language to refer expressly to the election to use the alternate valuation date under section 2032.

(5) Treas. Reg. § 1.467-7(c)(2) provides that section 467 recapture does not apply to a disposition on death of the transferor if the basis of the property in the hands of the transferee is determined under section 1022. However, section 467 recapture does apply to property that constitutes a right to receive an item of income in respect of a decedent. Prop. Treas. Reg. § 1.467-7(c)(4) provides that, if the transferee subsequently disposes of the property in a transaction to which Treas. Reg. § 1.467-7(a) applies, the prior understated inclusion is computed by taking into account the amounts attributable to the period of the transferor's ownership of the property prior to the first disposition.

(6) Treas. Reg. § 1.742-1(a) provides that the basis of a partnership interest acquired from a decedent who died in 2010, and whose executor made a Section 1022 election, is the lower of the adjusted

basis of the decedent or fair market value of the interest at the date of decedent's death. The basis of property acquired from a decedent may be further increased under section 1022(b) and/or 1022(c), but not above the fair market value of the interest on the date of the decedent's death.

(7) Treas. Reg. § 1.1014-4(a) provides that the basis of property acquired from a decedent, including basis determined under section 1022, is uniform in the hands of every person having possession or enjoyment of the property at any time, whether obtained under the will or other instrument or under the laws of descent and distribution.

(8) Treas. Reg. § 1.1014-5(b) provides that, in determining gain or loss from the sale or other disposition of a term interest in property the adjusted basis of which is determined pursuant to section 1022, that part of the adjusted uniform basis assignable under the rules of § 1.1014-5(a) to the interest sold or otherwise disposed of is disregarded to the extent and in the manner provided by § 1001(e).

(9) Treas. Reg. §§ 1.1245-2(c)(2)(ii)(d) and 1.1245-3(a)(3) provide that, if § 1245 property is acquired from a decedent who died in 2010 and whose executor made a § 1022 election, the amount of the adjustments reflected in the adjusted basis of the property in the hands of the transferee immediately after the transfer is equal to the amount of the adjustments reflected in the adjusted basis of the property in the hands of the transferor immediately before the transfer, minus the amount of any gain taken into account under § 1245(a)(1) by the transferor upon the transfer. Further, even though property is not of a character subject to the allowance for depreciation in the hands of the taxpayer, the property is § 1245 property if the taxpayer's basis in the property is determined under § 1022 and the property was of a character subject to the allowance for depreciation in the hands of the decedent.

(10) Treas. Reg. § 1.1245-4(a)(1) provides that no gain is recognized under § 1245(a)(1) upon a transfer of § 1245 property from a decedent whose executor made the § 1022 election.

(11) Treas. Reg. § 1.1250-4(c)(5) provides that the holding period under § 1250(e) for the recipient of property acquired from a decedent who died in 2010, and whose executor made a § 1022 election, includes the period that the property was held by the decedent.

(12) Treas. Reg. § 1.1254-2(a)(1) provides that no gain is recognized under § 1254(a)(1) upon a transfer of natural resource recapture property from a decedent who died in 2010 and whose executor made a § 1022 election.

(13) Treas. Reg. §§ 1.1254-3(b), 1.1254-4(e)(4), and 1.1254-5(c)(2)(iv) provide that, for purposes of determining the amount of § 1254 costs from the disposition of natural resource recapture property, the term "gift" is expanded to include the transfer of property with a basis that is determined under § 1022. **T.D. 9811, 82 Fed. Reg. 6235 (Jan. 19, 2017).**

APPLICABLE EXCLUSION AMOUNT. The IRS has issued a Notice which provides guidance on the application of the decision in *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), and the holdings of *Rev. Rul. 2013-17, 2013-1 C.B. 201*, to the rules regarding the applicable exclusion amount under I.R.C. §§ 2010(c) and 2505 and the generation-skipping transfer (GST) exemption

under I.R.C. § 2631, as they relate to certain gifts, bequests, and generation-skipping transfers by (or to) same-sex spouses. In particular, this Notice provides special administrative procedures allowing certain taxpayers and the executors of certain taxpayers' estates to recalculate a taxpayer's remaining applicable exclusion amount and remaining GST exemption to the extent an allocation of that exclusion or exemption was made to certain transfers made while the taxpayer was married to a person of the same sex. With respect to the applicable exclusion amount applied to a transfer between spouses that did not qualify for the marital deduction for federal estate or gift tax purposes at the time of the transfer, based solely on the application of the Defense of Marriage Act (DOMA), *Pub. L. No. 104-199, 110 Stat. 2419*, taxpayers will be permitted to establish that transfer's qualification for the marital deduction and to recover the applicable exclusion amount previously applied on a return by reason of such a transfer, even if the limitations period applicable to that return for the assessment of tax or for claiming a credit or refund of tax under I.R.C. §§ 6501 or 6511, respectively, has expired. If, however, qualification for the marital deduction or a reverse qualified terminable interest property (QTIP) election would require a QTIP, qualified domestic trust (QDOT), or reverse QTIP election, such taxpayers will have to request relief pursuant to Treas. Reg. § 301.9100-3 to make such an election. With respect to a taxpayer's GST exemption that was allocated to transfers made, prior to the recognition of same-sex marriages for federal tax purposes, to or for the benefit of one or more persons in a same-sex marriage and/or any other person(s) whose generation assignment is determined under I.R.C. § 2651 with reference to a same-sex spouse, certain exemption allocations to transfers to persons now recognized to be non-skip persons as defined in I.R.C. § 2613(b) will be deemed void. Accordingly, taxpayers who made such a transfer will be permitted to recalculate the amount of their remaining GST exemption. **Notice 2017-15, I.R.B. 2017-15.**

PORTABILITY. The decedent died, survived by a spouse, on a date after the effective date of the amendment of I.R.C. § 2010(c), which provides for portability of a "deceased spousal unused exclusion" (DSUE) amount to a surviving spouse. The decedent's estate did not file a timely Form 706 to make the portability election. The estate discovered its failure to elect portability after the due date for making the election. The estate represented that the value of the decedent's gross estate was less than the basic exclusion amount in the year of the decedent's death including any taxable gifts made by the decedent. The IRS granted the estate an extension of time to file Form 706 with the election. **Ltr. Rul. 201702020, Sept. 6, 2016; Ltr. Rul. 201702023, Sept. 6, 2016; Ltr. Rul. 201702025, Sept. 6, 2016; Ltr. Rul. 201702026, Sept. 6, 2016; Ltr. Rul. 201702028, Sept. 6, 2016; Ltr. Rul. 201702030, Sept. 6, 2016; Ltr. Rul. 201702031, Sept. 6, 2016; Ltr. Rul. 201702032, Sept. 6, 2016.**

FEDERAL INCOME TAXATION

DISCHARGE OF INDEBTEDNESS. The IRS has issued a revenue procedure which provides relief from discharge of indebtedness income for taxpayers whose federal student loans, taken out to attend a school owned by the American Career Institutes, Inc., are discharged by the Department of Education under the "Closed School" or "Defense to Repayment" discharge process. The revenue procedure provides that the IRS will not assert that the entity discharging these loans has an information reporting requirement. The revenue procedure modifies *Rev. Proc. 2015-57, 2015-2 C.B. 863*, to provide similar reporting relief for creditors under that revenue procedure. **Rev. Proc. 2017-24, I.R.B. 2017-7.**

EARNED INCOME TAX CREDIT. The IRS has published information for working grandparents raising grandchildren about the earned income tax credit (EITC). The EITC is a federal income tax credit for workers who do not earn a high income (\$53,505 or less for 2016) and meet certain eligibility requirements. Because the EITC is a refundable credit, those who qualify and claim the credit could pay less federal tax, pay no tax or even get a tax refund. The EITC could put an extra \$2 or up to \$6,269 into a taxpayer's pocket. Grandparents and other relatives care for millions of children, but are often not aware that they could claim the children under their care for the EITC. A grandparent who is working and has a grandchild who is a qualifying child living with the grandparent may qualify for the EITC, even if the grandparent is 65 years of age or older. Generally, to be a qualified child for EITC purposes, the grandchild must meet the dependency requirements. Special rules and restrictions apply if the child's parents or other family members also qualify for the EITC. Details including numerous helpful examples can be found in Publication 596, *Earned Income Credit (EIC)*, available on IRS.gov. There are also special rules, described in the publication, for individuals receiving disability benefits and members of the military. Working grandparents are encouraged to find out, not guess, if they qualify for this very important credit. To qualify for EITC, the taxpayer must have earned income either from a job or from self-employment and meet basic rules. Also, certain disability payments may qualify as earned income for EITC purposes. EITC eligibility also depends on family size. The IRS recommends using the EITC Assistant, on IRS.gov, to determine eligibility, estimate the amount of credit and more. Eligible taxpayers must file a tax return, even if they do not owe any tax or are not required to file. **IR-2017-09.**

The IRS has published information for taxpayers living in rural communities about the earned income tax credit (EITC). The EITC is a federal income tax credit for working people who earn \$53,505 or less (for 2016) and meet certain eligibility requirements. Because it is a refundable credit, those who

qualify and claim the credit could pay less federal tax, pay no tax or even get a tax refund. EITC can mean up to a \$6,269 refund for working families with qualifying children. Workers without a qualifying child could be eligible for a smaller credit up to \$506. Even though household income in many rural areas is below the national average, many of these taxpayers are often not aware that they may qualify for EITC. An eligible taxpayer must have earned income from employment or running or owning a business or farm and meet basic rules. Eligibility also depends on family size, but single workers without a qualifying child who earn less than \$20,430 may qualify for a smaller credit. Also, certain disability payments may qualify as earned income for EITC purposes. The IRS recommends using the EITC Assistant, on IRS.gov, to determine eligibility, estimate the amount of credit and more. To get the credit, Taxpayers must file a tax return, even if they do not owe any tax or are not required to file. **IR-2017-08.**

EMPLOYEE EXPENSES. The taxpayer husband was employed as a teacher and the wife was employed as a nurse. On the taxpayers' joint return for 2011, the taxpayers claimed unreimbursed employee business expenses for the wife on Form 2106, *Employee Business Expenses*, for vehicle expenses and meal and entertainment expenses. The taxpayer did not provide any contemporaneous written records to substantiate the expenses, did not provide a copy of the employer's reimbursement policy for such expenses, and did not produce evidence that the expenses were not reimbursed by the employer; therefore, the court upheld the IRS disallowance of the deductions for these expenses. **Oatman v. Comm'r, T.C. Memo. 2017-17.**

FUEL TAX CREDIT. From 2004 through 2010, the taxpayer volunteered as a grant writer, adult educator, and Sunday school teacher for a church which qualified as an I.R.C. § 501(c)(3) organization exempt from tax. The taxpayer filed a return for 2011 which included a claim for a refundable fuel tax credit based on Forms 4136, *Credit for Federal Tax Paid on Fuels*, for 2005, 2006, 2007, 2008 and 2009. No Forms 4136 were filed with the income tax returns for those years. The taxpayer provided evidence of purchases of propane in 2009 and 2010 but did not provide evidence that the propane was used by the church for church purposes nor that any propane was purchased or used in 2011. I.R.C. § 34(a)(3) provides a credit equal to the amount payable to a taxpayer under I.R.C. § 6427 which provides in pertinent part that the amount payable to a taxpayer is equal to any tax imposed under I.R.C. § 4041(a)(2) on, *inter alia*, the sale of propane to a taxpayer, if the taxpayer used that propane for a nontaxable purpose during the taxable year for which that taxpayer is claiming the credit. I.R.C. § 4041(g)(4) provides in pertinent part that no tax is to be imposed on the sale of propane if (1) the propane is sold to a nonprofit educational organization or (2) a nonprofit educational organization uses the propane as a fuel. The court held that the taxpayer was not entitled to the fuel tax credit because of the failure to show that the propane was purchased in 2011 or was used by the church in 2011. **Ibeagwa v. Comm'r, T.C. Memo. 2017-19.**

HEALTH INSURANCE. The IRS has issued a Notice which

provides that the hardship exemption from the individual shared responsibility payment under I.R.C. § 5000A, described by the Department of Health and Human Services, for an individual who is not enrolled in health insurance coverage that qualifies for the health coverage tax credit (HCTC) allowed by I.R.C. § 35 for one more month between July 2016 and December 2016, but who would have been eligible for the HCTC under I.R.C. § 35 if enrolled, may be claimed on a federal income tax return without obtaining a hardship exemption certification from the Marketplace. **Notice 2017-14, I.R.B. 2017-6.**

The IRS has issued a Notice which provides that under the authority granted to the Secretary by I.R.C. § 35(g)(11)(B), an HCTC election for a month in 2016 may be made at any time before the expiration of the 3-year statute of limitation under I.R.C. § 6511 for such year, including on an amended income tax return. This extension of time is provided because, prior to its expiration, the HCTC did not require an election and the Treasury Department and the IRS are concerned that eligible taxpayers may not be aware of the requirement to affirmatively elect the HCTC for coverage provided in 2016. **Notice 2017-16, I.R.B. 2017-7.**

MEDICAL MARIJUANA. The taxpayers operated a legal medical marijuana dispensary in Colorado. The taxpayers filed returns claiming business expense deductions for the store which were denied by the IRS under I.R.C. § 280E because the business involved the "trafficking in controlled substances." The taxpayers argued that the IRS enforcement of I.R.C. § 280E was improper because it required the IRS to conduct a criminal investigation beyond the IRS authority. The court rejected this argument, ruling that no criminal investigation or charges were needed to enforce I.R.C. § 280E as to proper business expense deductions. **Alpenglow Botanicals, LLC v. United States, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,127 (D. Colo. 2017).**

PARSONAGE INCOME. The taxpayers, husband and wife, took a vow of poverty and established a corporation sole to operate a church ministry. The taxpayers transferred all their assets to the corporation, including their home. The church did not have any members and the taxpayers' only activity was to travel across the country helping other establish similar corporations. The taxpayers accepted "donations" based on a schedule of services. The taxpayer did not report any income and did not file returns for three tax years involved in the case. The IRS made assessments of taxes based on bank deposits. The Tax Court held that the amounts received by the taxpayers for their services were taxable income to the taxpayers and subject to self-employment taxes. Although the "donations" were made to the corporation, the Tax Court held that the amounts were taxable to the taxpayers because they performed all the services and had complete control over the corporation. The appellate court affirmed. **Gardner v. Comm'r, 2017-1 U.S. Tax Cas. (CCH) ¶ 50,128 (9th Cir. 2017), aff'g, T.C. Memo. 2013-67.**

PASSIVE ACTIVITIES. The taxpayer was a plastic surgeon who practiced at a facility owned by an LLC of which the taxpayer was a limited partner and did not have any involvement in management. The taxpayer also performed surgery at a local

hospital if the surgery could not be performed at the LLC facility. The taxpayer's patients paid the taxpayer separately for the surgery and paid the LLC for use of the facility if the surgery took place there. The taxpayer received distributions from the LLC which were not dependent upon the number of surgeries performed at the LLC facility. The taxpayer, through advice from an accountant, did not group the taxpayer's surgery services with the distributions from the LLC and the taxpayer treated the LLC distributions as passive income which was used to offset passive losses from other activities. In general, a passive activity is any trade or business in which the taxpayer does not materially participate. See I.R.C. § 469(c)(1). A taxpayer materially participates in an activity if the taxpayer is involved in the operations of the activity on a regular, continuous, and substantial basis. See I.R.C. § 469(h)(1). "Treas. Reg. § 1.469-4(c) sets forth the circumstances for grouping tax items to determine what constitutes a single activity. That regulation provides that "[o]ne or more trade or business activities or rental activities may be treated as a single activity if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469." Whether activities constitute an "appropriate economic unit" depends on the facts and circumstances but the regulation gives the greatest weight to five factors:

- (1) similarities and differences in types of trades or businesses;
- (2) the extent of common control;
- (3) the extent of common ownership;
- (4) geographical location; and
- (5) interdependencies between or among the activities.

The court held that the taxpayer did not group the LLC ownership with the surgical practice and the two activities were sufficiently separate to support not grouping them. The court held that the taxpayer held only an investment interest in the LLC because the taxpayer was not involved in the operation of the surgical facility on a regular, continuous and substantial basis. The court also noted that the facility received separate payments from the taxpayer's patients and made distributions to the taxpayer independent from the taxpayer's use of the facility. Thus, the court held that the LLC distributions were passive income to the taxpayer. **Hardy v. Comm'r, T.C. memo. 2017-16.**

SAFE HARBOR INTEREST RATES

February 2017

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	1.04	1.04	1.04	1.04
110 percent AFR	1.14	1.14	1.14	1.14
120 percent AFR	1.25	1.25	1.25	1.25
Mid-term				
AFR	2.10	2.09	2.08	2.08
110 percent AFR	2.31	2.30	2.29	2.29
120 percent AFR	2.53	2.51	2.50	2.50
Long-term				
AFR	2.81	2.79	2.78	2.77
110 percent AFR	3.09	3.07	3.06	3.05
120 percent AFR	3.38	3.35	3.34	3.33

Rev. Rul. 2017-04, I.R.B. 2017-6.

S CORPORATIONS

PASSTHROUGH DEDUCTIONS. The taxpayers, husband and wife, owned interests in two entities, an LLC and an S corporation. The S corporation was administratively dissolved in 2007 by the state for failure to file an annual report. The corporation owed employment taxes for 2000, 2001 and 2002 which were assessed against the taxpayers personally. In 2012 the LLC provided funds to the IRS in payment of the unpaid employment taxes. The corporation had not filed returns for 2003 through 2011. The corporation filed a return for 2012 claiming the payment as a salary and wage expense deduction which was passed through to the taxpayers. The return did not list any income, assets or other deductions. The taxpayers claimed that the wages and salaries were paid in 2000, 2001 and 2002. The taxpayers argued that the corporation was still active because the IRS sought collection of the taxes from the corporation and made the payment of the assessed employment taxes. The court held that the corporation was not engaged in a trade or business in 2012, was not liable for the taxes assessed against the taxpayers personally and did not incur any salary or wage expense in 2012; therefore, the deduction was properly disallowed. The court noted that the expense was actually incurred by the LLC and any deduction for payment of the employment taxes was prohibited by I.R.C. 162(f). **Brown v. Comm'r, T.C. Memo. 2017-18.**

STATE REGULATION OF AGRICULTURE

PROPERTY TAXES. The taxpayers owned a five acre parcel of rural land which the taxpayers used to raise wild birds for sale as pets. Although the county appraiser granted the taxpayers an agricultural tax classification for 4.5 acres from 2006 through 2012, the appraiser reduced the acreage subject to the special classification to 2.25 acres in 2013 and 2014. The county argued that only the portion of the property used for cattle grazing was eligible for the special tax designation because the statute, Fla. Stat. § 193.461(5), listed only poultry raising as an agricultural purpose covered by the statute. The statute states: "For the purpose of this section, the term 'agricultural purposes' includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, if the land is used principally for the production of tropical fish; aquaculture, including algaculture; sod farming; and all forms of farm products as defined in § 823.14(3) and farm production." The taxpayer argued that the list of activities was not exclusive and aviculture was sufficiently similar to the listed activities to qualify for the special tax designation. The court noted that Fla. Stat. § 823.14(3) defines "farm product" as "... any ... animal ... useful to humans." The taxpayers had submitted evidence that pet birds are useful to humans. Therefore, the court held that land used for the breeding and raising of pet wild birds was eligible for the agricultural tax classification. **McLendon v. Nikolits, 2017 Fla. App. LEXIS 765 (Fla. Ct. App. 2017).**

ZONING

AGRITOURISM. The plaintiffs owned and operated a large farm and sought permission from the county planning department to operate a skydiving business on the property as agritourism. The permission was denied because the department decided that the skydiving business violated the large scale agricultural district zoning designation for the property. The county cited the plaintiffs for violating the zoning ordinance and the plaintiffs appealed to the county code enforcement board which held for the plaintiffs, allowing the skydiving activity. However, before the board ruled, the plaintiffs petitioned the trial court for relief and the county filed a cross claim for an injunction, which was granted by the court. The plaintiffs appealed the injunction. The appellate court noted that in order to obtain an injunction against someone who is violating the zoning code, a county must show (1) a clear legal right to the relief, (2) inadequacy of a legal remedy, and (3) irreparable injury if the relief is not granted. In this case, the appellate court found that the trial court failed to properly find that the county had a clear legal right to relief because the ruling of the county was not sufficient to establish a legal right in that the zoning ordinance did not clearly state that skydiving was not an allowed activity for the zoning designation of agricultural district. In addition, once the enforcement board ruled in favor of the plaintiffs, the board's ruling established the lack of a legal right for relief for the county, undermining the legitimacy of the injunction imposed by the trial court. The appellate court noted that the large scale agricultural district zoning ordinance allowed "outdoor recreational activities such as hunting or fishing camps, bait and tackle shops, shooting ranges, and golf courses." Since the ordinance could be interpreted to allow a commercial skydiving activity, there did not exist a clear legal right for relief to support the injunction; therefore, the appellate court reversed the trial court and remanded the case. **Nipper v. Walton County, 2017 Fla. App. LEXIS 361 (Fla. Ct. App. 2017).**

IN THE NEWS

ALTERNATIVE MINIMUM TAX. The IRS has announced on its website that the instructions for various 2016 forms relating to the Alternative Minimum Tax (AMT) will be amended to provide that property for which a taxpayer elects out of bonus depreciation is not subject to an AMT depreciation adjustment, effective for property placed in service after 2015. This change, according to the IRS, was made by the Protecting Americans from Tax Hikes Act of 2015 (PATH Act) (Pub. L. No. 114-113). The affected instructions are for 2016 Form 6251, *Alternative Minimum Tax - Individuals*, Form 4626, *Alternative Minimum Tax - Corporations*, and Form 1041, Schedule I, *Alternative Minimum Tax - Estates and Trusts*. A technical correction made by section 143(b) of the PATH Act provides that the AMT adjustment does not apply to

"qualified property" as defined in I.R.C. § 168(k)(2)(G). However, if the election out is made for a class of property, I.R.C. § 168(k)(7) simply provides that the bonus depreciation deduction allowed under I.R.C. § 168(k)(1) does not apply. Therefore, the status of the property for which an election out is made technically remains "qualified property" under I.R.C. § 168(k)(2) and exemption from the AMT adjustment applies. Prior to amendment by the PATH Act, the AMT adjustment was only waived for property for which bonus depreciation was claimed. CCH notes "It is unclear whether this change was inadvertent. The PATH Act was enacted into law on December 18, 2015. The committee reports for the PATH Act do not mention the change. The Joint Committee Blue Book neither mentions the change nor a need for a technical correction (JCT General Explanation of Tax Legislation Enacted in 2015, JCS-1-16). Although technical corrections have been proposed for various provisions of the PATH Act, a change back to the original rule (i.e. an AMT adjustment is not necessary only if bonus depreciation is claimed) is not included (Technical Corrections Act of 2016 (HR 4891, Sen 2775))." The IRS plans to issue a revenue procedure within the next two weeks that explains the new rule. **CCH Federal Tax Day - Current, I.4, Jan. 24, 2017.**

TAX SCAMS. The IRS, state tax agencies and the tax industry today renewed their warning about an e-mail scam that uses a corporate officer's name to request employee Forms W-2 from company payroll or human resources departments. The IRS already has received new notifications that the e-mail scam is making its way across the nation for a second time. The IRS urges company payroll officials to double check any executive-level or unusual requests for lists of Forms W-2 or Social Security number. The W-2 scam first appeared last year. Cybercriminals tricked payroll and human resource officials into disclosing employee names, SSNs and income information. The thieves then attempted to file fraudulent tax returns for tax refunds. This phishing variation is known as a "spoofing" e-mail. It will contain, for example, the actual name of the company chief executive officer. In this variation, the "CEO" sends an e-mail to a company payroll office or human resource employee and requests a list of employees and information including SSNs. The following are some of the details that may be contained in the emails:

- Kindly send me the individual 2016 W-2 (PDF) and earnings summary of all W-2 of our company staff for a quick review.
- Can you send me the updated list of employees with full details (Name, Social Security Number, Date of Birth, Home Address, Salary).
- I want you to send me the list of W-2 copy of employees' wage and tax statement for 2016, I need them in PDF file type, you can send it as an attachment. Kindly prepare the lists and e-mail them to me asap. **IR-2017-10.**

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